United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2537

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

IN THE MATTER OF THE CIVIL CONTEMPT OF

ANTHONY B. CATALDO,

Appellant.

Docket No. 74-2537

REPLY BRIEF

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ANTHONY B. CATALDO and
ADA W. CATALDO

Plaintiffs

v.

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IN THE MATTER OF THE CIVIL CONTEMPT OF
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REPLY BRIEF

QUESTIONS INVOLVED

1. How does an alleged contemnor who is at the same time a lawyer in good standing go about showing this court that the district court's fact findings stated in the alleged order of contempt have no support in the facts?

2. How does the same lawyer go about meeting irrelevancies in the arguments advanced by the Assistant United States Attorney in appellee's brief and set aright the many false claims to facts found in said brief?

POINT I

THE FACT FINDINGS IN THE ORDER OF CONTEMPT HAVE NO SUPPORT IN THE RECORD.

The order of contempt states:

> "Anthony B. Cataldo, an attorney, having appeared before this court on May 10, 11 and 14, 1973 as pro se attorney and attorney for Ada W. Cataldo, and the said attorney, after having been admonished by this court with respect to repeated refusal to obey the

direction of the court and repeatly having interrupted the court and continuing to argue matters of evidentiary rulings contrary to the direction of the court, having been required to show cause why he should not be held for civil contempt, and after hearing the said Anthony B. Cataldo on the 11th and 14th days of May, 1973 it is"

The alleged contemnor is the scrivener of this reply brief. He was in court trying the case referred to. He was a witness to the proceedings. He observed them and he is competent to testify as to the occurrences on May 10, 11, and 14, 1973 in the court room presided over by the Hon. Richard H. Levet.

In contrast, the Assistant United States Attorneys writing appellee's brief were not there at the trial and have no personal knowledge of the facts of the matter. Yet, they state inferences and conclusions of facts in appellee's brief which do not follow from the true facts. They seriously distort what did occur. A transcript of the entire proceedings on the three days mentioned, May 10, 11 and 14, was made and it is a part of the Record on Appeal. That record proves that appellant's claims to facts are accurate, while the many claims of the appellee's brief are not.

Appellant claims that the recitation of facts and proceedings found in the order of contempt made May 18, 1973 (A4) are untrue except for the statement that proceedings were held on May 10, 11 and 14, but those proceedings were only the trial proceedings. There were no separate contempt proceedings held as contemplated under Rule 42 (b) Federal Rules of Criminal Proceedings. The order should have clearly stated that it was the

order contemplated by Rule 42 (a), but it did not. It should have recited that the contempt was committed in his presence, and, the order should have recited what the judge saw and heard which constituted the contempt charge. The trial judge acted summarily when he held appellant for contempt and assessed the fine $50. This proceeding is set forth in the photo-copies of the transcript which appear at pp.A8 and A9 of the appendix on this appeal. Note that the charge was made while appellant was answering a question posed by the Judge. Appellant believed that the Judge was truly interested in learning what had been said a second before. Appellant's tone was a helpful tone intent on explaining the problem to the court. Appellee's brief says there was shouting. There was no shouting at any time. Neither before this time, nor at any time after this point of the trial. The judge does not say in his order why he held appellant for contempt. Of course, the Assistant United States Attorneys may not supply the missing allegations.

Nor was appellant"admonished with respect to the repeated refusal to obey the direction of the court" as is stated in the written order of May 18,1973. This court will look in vain in the record for such facts. The facts to support this conclusion are not set forth in the record because they do not exist. This statement by itself is a conclusion and incompetent to support the order.

Nor was there any "repeatly having interrupted the court and continuing to argue matters of evidentiary rulings contrary to the direction of the court". This conclusion, too,

is without support in the record. Nor are there any supporting statements of facts in the order of May 18, 1973 because no such thing ever happened. Appellant tried validly to make offers of proof, both formal and informal, but such actions, although they are normal trial procedures were refused. Adducing evidence is the job of every trial lawyer. It is not contemptuous to offer evidence unless the trial was obstructed thereby. Here it was not obstructed. Our Supreme Court has said that it is a lawyer's duty to put the evidence in the record; it is not contemptuous conduct; see In re McConnell, 370 U.S. 230.

Nor was there any "having been required to show cause why he should not be held for civil contempt," Nor was there any such thing as "after hearing the said Anthony B. Cataldo on the 11th and 14th days of May, 1973". There was no order to show cause issued, there was no order in writing or by way of an oral direction to appear and attend upon a hearing on a contempt charge. There was no hearing on May 11, and 14, 1973 relating to contempt. There was only the continuance of the trial.

Also this wording shows that the trial court meant "civil" contempt, not criminal contempt as was surmised by this court on the prior appeal (A19). That it was error to call it a civil contempt is proof of its unlawfulness, not that it was a mistake and criminal was meant instead of civil. It is just as unfair for this court to lean over backwards regarding facts to affirm as it is for a trial court to do so, arbitrarily, for one or the other of the parties. Judge Levet had the

opportunity
/to contradict the foregoing denials when they were made by appellant on the motion to vacate or resettle his order of May 18,1973, p.A19 and A20. The judge denied the motion in a decision and order in which he fails to deny these charges and also to assert any facts descriptive of contemptuous conduct. This failure is an admission that appellant was right. This failure and the trial transcript are proof of the impropriety and unlawfulness of the inferences and conclusions of the Appellee's brief. It is also proof that serious error was made in entering an order of contempt without support in the record for the fact conclusions stated in it. Neither does the order comply with the directions of Rule 42 of the Criminal Rules. Appellant has also attacked the form of the order for its failure to state the evidentiary proof of the facts alleged to have been contemptuous. That attack, too, is a valid ground for reversal on the authorities stated in the main brief.

Note that if this court treats with the order of May 18, 1973 as coming within the scope of Rule 42 (b), that it will be committing serious error because such order would have been entered without notice and without a fair opportunity to be heard. Hence, the due process provisions of our Constitution will be transgressed. See 3 Wright, Federal Criminal Practice and Procedure, Section 711. Whichever way the order is looked at, it is respectfully submitted that it is improper as to form as not complying with the requirements of Rule 42 and it is unlawful as to substance as there are no facts to support the charge.

One more thing, appellant had made application during

the trial to have the judge withdraw the contempt charge and before the close of the case, Judge Levet said that he would enter an order when he decided the case (A10). At p.11, deponent is again shown to be moving for the remission of the penalty, when he was cut off by the judge who said he would decide the matter later. Two days later, on May 16, 1973, appellant received a small check out of which he sent the judge his check for $50., with a request that he remit the penalty. Appellant wrote out his reasons for the remission; see the letter of May 16, 1973 at A1 of the appendix. The letter should have induced a withdrawal of the charge, but it was not. Instead, the $50. was retained and an order reciting untrue events was made and filed in a plain effort to retain the $50. without lawful reason. This is rather unbecoming a Federal judge.

POINT II

THE DISTORED FACTS OF THE IRRELEVANCIES IN APPELLEE"S BRIEF.

But for Point III where appellee speaks of the contempt, the remainder of the brief is given over to artfully contrived claims to law to defeat the reversal of the order of contempt without a statement of any reason why such alleged law should be sustained on the merits. Point I and II of Appellee's brief are learned statements of such irrelevancies and at the same time, they are untrue as to fact and applicable law.

The short answer to Point I (A) is that the refusal of this court to pass upon the merits of the alleged contempt

order was based upon the lack of notice of appeal. This court's refusal is not a final order on the merits. It avoided the merits. Hence it is not entitled to res judicata effect. See Industrial Credit Co. v. Berg, 388 F. (2) 836 and Saylor v. Lindsey, 391 F. (2) 965, 968.

The short answer to Point 1B is that the order of contempt has never been entered in the criminal docket and Rule 4(b) of the Rules of Appellate Procedure states that the 10 day period for filing a notice of a criminal appeal starts from the entry of the order in the criminal docket, or, if the order is not entered in the criminal docket, then from the date of the notice of appeal. The hard-nosed persistency shown in appellee's brief to rob appellant of his rights under this Rule deserves the condemnation of this court. The rule is plainly written for any one to understand if he will read without distortion.

This kind of eclectic rhetoric by an Assistant United States Attorney, who should know better, is wasteful of everyone's time and of taxpayer's money.

The bootstrap argument of Point II is false because it has chopped away and ignored the fact that appellant was moving for a resettlement of the order of contempt as well as moving to vacate it altogether. Where the order recites that it was a Civil contempt and the Court of Appeals says that such an order was a criminal contempt, and if, the latter refused to consider the merits of the order despite the designation by the district court as a civil contempt, why isn't an

application to have the order re-entered as a criminal contempt a proper procedure? Why was the motion to vacte it because of the trial court's error in confusing criminal contempt with civil contempt, a proper procedure? Appellant had relied on the said order to his detriment. To refuse to grant the relief can only be an arbitrary judicial act. It is not lawful to refuse to correct one of its own improper and unlawful orders if that order has wrought injury to a party.

In any event, the appeal from the order of denial of October 17, 1974 brings up for review the order of May 18, 1973 as well as the order denying the motion to vacate or resettle the latter order. As neither order was ever docketed in the criminal docket, the time to appeal from the May 18,1973 order had never run when the motion to vacate or resettle it was made. Thus both orders could be reviewed, see 4A C.J.S., Appeal and Error, Section 433; Mitchell v. Maurer, 67 P.(2) 286 and Larkin Packer Co. v. Hinderlite, 60 F. (2) 491. Also, 4A C.J.S., Appeal and Error, Section 428, at p. 72 states that an appeal taken in accordance with the statute is never barred by laches. Appellant cannot be faulted in the procedures he has followed to get a review of the order of contempt on the merits.

POINT III

APPELLEE'S POINT III IS INVALID.

The claim of refusal to abide by the directions of the court without also finding them to be obstructive of justice is insufficient in form and is without support in the facts to

sustain the charge of contempt. See appellant's brief, Points III and IV.

There was no"shouting match" and no "arguments on minor points", or in any other indulgence in the flights of fancy made by appellee's counsel, which, while descriptive, are plain deceptions upon this court and the appellant.

Nor are the citation to eight pages of the transcript, where alleged interruptions could be found, descriptive of any contemptuous conduct. The court will find them to depict the ordinary "give and take" upon a trial between court and counsel, with no boisterous language, no obstructive tactics, in fact, with compliance by the attorney with the judge's directions. Yet, obedience meant giving up the proof of facts he wanted in the record, the failure of which resulted in the dismissal of his cause. These pages are descriptive of an orderly trial. Though, an unfair one. The judge directed what the lawyer should put in evidence. Even guessing at what the judge wanted required the judge to repeat his requests. These few instances have nothing to do with the order of May 18, 1973, nor, with the summary charge of contempt which appears at p.A9 of the appendix on this appeal.

Nor does Point III of appellee's brief take issue with Points III and IV of appellant's brief which deal with the lack of merits in the order of contempt. Accordingly, it is safe to assume that astute government counsel could not find anything to argue against.

POINT IV

IT IS ALSO SUBMITTED THAT THE APPENDIX FILED BY APPELLEE WAS UNNECESSARY.

The papers in appellee's appendix are not part of the record on appeal. Such material as was used was used in the distractive points I and II. When appellant had duly served the designations for the appendix according to the Rules of Appellate Procedure, appellee failed to respond. The cost of such an appendix was not necessary to this appeal.

CONCLUSION

The order of May 18, 1973 should be set aside and vacated and the fine remitted with interest. Also, appellant should be awarded costs and reimbursement of his disbursements. It should do more, but that is left to the discretion of the court. Appellant has lost his case by following the directions of the trial judge. He has incurred more than $1,000 of expense on the trial and the appeals and even has re-imbursed the National Surety Corporation for the $250 that company was called upon to pay under the bond it had filed on the prior appeal. He has spent innumerable hours in research and in composing the many papers seeking his clearance from this infamous charge of contempt. And the mortification that was induced! A citizen-lawyer coming to court to claim a refund of $2,700 paid upon an unlawful and arbitrary assessment and he is told not to pursue the line of questioning that would win the case for him. The court said, do it my way or contempt! That way turned out to be wrong. It also was costly in an unfair way.

Respectfully submitted,

Anthony B. Cataldo

Attorney for appellant, pro se